In the High Court of Judicature at Madras

Dated:20.02.2007

Coram

The Honourable Mr.Justice A.C.ARUMUGAPERUMAL ADITYAN

Second Appeal No.414 OF 1997

1. K.Subramaniam
2. K.Ramasamy ..Appellants/Plaintiff

v

1.P.Karuppananadar
2.A.Marappagounder
3.A.Shanmugham
4.Ramasamy Gounder
5.S.Palanisamy ..Respondents/Defendants

This second appeal is filed under Section 100 CPC against the judgment and decree dated 29.10.1996 made in A.S.No.16 of 1996 on the file of the Court of Additional Subordinate Judge,Erode confirming the decree and Judgment made in O.S.No.704 of 1990 on the file of the Court of the first Additional District Munsif, Erode, dated 3.8.1995.

For Appellants : Mr.M.M.Sundaresh
For Respondents : Mr.A.K.Kumarasamy

JUDGMENT

This appeal has been preferred against the Judgment and decree in A.S.No.16 of 1996 on the file of the Court of Additional Subordinate Judge, Erode. The plaintiffs who have lost their case before the Courts below are the appellants herein. The suit is for mere injunction in respect of the eastern fence in R.S.No.245/5 which is shown as "BC" in the plaint plan(EX C2).

2. The averments in the plaint in brief sans irrelevant particulars are as follows:

The suit property originally belonged to the plaintiffs and their brother Kolandasamy. The total extent of the plaint suit survey No. 158 in Kulavillakku Village of Erode Taluk is 4.05 acres. The plaintiffs and their brother Kolandasamy were entitled to undivided ¼th share in the above said property. On 2.1.1976, they have mortgaged the same in favour of one Ramasamygounder of Ayappaarappu for a sum of Rs.4,000/-.

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Subsequently, the said mortgage debt was discharged. The re-survey Number assigned to the old Survey No.158 is R.S.No.245. The owners of the suit survey field viz., R.S.No.245 orally divided the property in which the plaintiffs have been allotted to an extent of 0.45.5 hectares on the north eastern corner with a right to use the north-south cart track on the eastern side. On 22.1.1990, a partition list was prepared evidencing the aforesaid oral partition. In the re-survey proceedings, the lands of the plaintiffs have been given a separate number as 245/5. In the plaint plan, the suit property has been shown in green colour. On the east of R.S.No.245 is R.S.No.246 belonging to the defendants. There exists an age old fence in between the aforesaid survey fields. There are number of age old trees in the said fence. The said fence is marked as "BC" fence in the plaint plan. The plaintiffs and their predecessors-in-title were in possession and enjoyment of the "BC" fence along with their lands in R.S.No.245 from time immemorial. The defendants have no manner of right, title or possession beyond"BC" fence. The defendants have made a request to the plaintiffs to sell the suit property to them. Since the plaintiffs have refused to oblige the request, the defendants with a bad motive attempted to cut the"BC" fence on 20.6.1990 and tried to trespass into the suit property. The said attempt of the defendants was prevented by the timely intervention of the plaintiffs. The plaintiffs apprehend that the defendants may at any time repeat their attempt to trespass into the suit property. Hence the suit for injunction.

3. Defendants 1 to 4 have adopted the written statement of D5 which runs as follows:

It is false to say that under an oral partition, survey number 245 was partitioned among the co-sharers and in the said partition, the plaintiffs were allotted an extent of 1.06 acres on the north eastern corner of the suit survey number property. There was no partition list dated 22.1.1990 was prepared in lieu of the oral partition. There was no separate number as 245/5 was assigned to the suit survey number property. The defendants' lands are lying on the east of the plaintiffs' lands. There is a fence existing between the plaintiffs' land and the defendants' land. But it belonged to the defendants. Neither the plaintiffs nor their predecessors-in-title were ever been in enjoyment of "BC" fence in the suit survey number property. The plaintiffs have no right or title or possession beyond "BC" fence. The defendants never requested the plaintiffs to sell the suit survey number property. It is false to allege that because of the refusal of the plaintiffs to sell the plaint schedule property, the defendants got enraged and made an attempt to trespass into the suit property on 20.6.1990 and also try to cut "BC"fence. The plaintiffs have made an attempt to encroach upon the western side of the defendants' property which was resisted by the defendants and the matter was taken to Panchayatars and in the presence of Panchayatars, the plaintiffs have agreed to re survey both the lands of the plaintiffs and the defendants. The survey was done by the Surveyor and he fixed the boundary in the month of June 1990. In the said survey,the surveyor has clearly shown that the

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north south boundary lies in the plaintiffs lands beyond the "BC" fence. Therefore, the panchayatars advised the plaintiffs to enjoy the property within the boundary fixed by the surveyor. But the plaintiffs refused to do so and with a supine in difference, they have filed this vexatious suit. In respect of the cart track leading to survey No.245, there is a suit pending between the co-sharers of survey No.245. The plaintiffs have certainly omitted to implead the other co-sharers of Survey No.245. In order to grab at "BC' fence, the plaintiffs have filed this suit. There is no cause of action for the plaintiffs. Hence the suit is liable to be dismissed.

4. On the above pleadings, the trial Court has framed five issues for trial. On the side of the plaintiffs, 2nd plaintiff has examined himself as P.W.1 and exhibited Exs P1 and P2 on their side. 5th defendant has examined himself as D.W.1 and no documents were marked on the side of the defendants. A Commissioner was appointed and he has filed his report EX C1 and plan Ex C2.

5. On the basis of the evidence both oral and documentary available before the trial Court, the learned trial Judge has come to a conclusion that the plaintiffs are not entitled to any relief asked for in the plaint and consequently dismissed the suit without costs. Aggrieved by the findings of the learned trial judge, the plaintiffs have preferred an appeal in A.S.No.16 of 1996 on the file of the Court of Additional Subordinate Judge, Erode and the learned first appellate Judge has also dismissed the appeal thereby confirming the decree and judgment of the learned trial Judge. Hence, against the concurrent findings of the Courts below, the plaintiffs have been before this Court by way of second appeal.

6. The substantial question of law involved in this appeal is

> " Have not the Courts below erred in holding there should have been the appointment of the Commissioner to fix the boundaries between the lands of the respective parties , especially when there is no necessity to do so?"

7. The Point:

The learned first appellate Judge has dismissed the appeal preferred by the plaintiffs only on the ground that the plaintiffs have failed to produce any document to show that "BC" fence situate on the east of the plaintiffs' survey No.245 belongs to the plaintiffs. Before the trial Court, the plaintiffs have produced Ex P1 document to show that they have mortgaged the plaint survey number property on 2.1.1976 in favour of one Ramasamy Gounder , S/o of Rasiyappa Gounder. But on a perusal of Ex A1 will go to show that there is no mention about the"BC" fence in the said document.

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7a) P.W.1 in his evidence in the cross examination has also admitted that only to show the suit fence belongs to the plaintiffs,he has produced Ex P1 mortgage deed. But at the same time, he would admit that in Ex P1, there is no mention about the "BC fence. A Commissioner was appointed to note down the physical features of the suit property. The Commissioner has filed Ex C1 report and Ex C2 plan.

7b) The learned counsel appearing for the appellants relying on Ex C1 Commissioner's report would contend that "BC" fence on the east of the plaint schedule property belongs to the plaintiffs. At the outset, we cannot give much importance to Ex C1 Commissioner's report because only under misconception that the suit property is a cart track, the learned Commissioner has proceeded with his work and filed the report. But actually, the suit property is a fence marked as "BC" in the rough sketch (Ex C2) on the eastern side of suit survey number 245/5. At paragraph 4 of his report Ex C1, the Commissioner has observed that there is a fence dividing the plaintiffs and defendants property which has been marked as "m M** and that there are old aged trees along the fence" mM** to Ex C2. From the above said observation, we cannot come to a conclusion that the fence marked " mM** in Ex C2 belongs to the plaintiffs as rightly observed by the Courts below.

7c) In support of his contention, the plaintiffs have examined one Somasundaram as P.W.2 who would depose to the fact that " mM** fence is between the lands of the plaintiffs and the defendants on the eastern side and would also depose that the suit is in respect of cart track and the fence, which is not even the case of the plaintiffs. He would admit that there is another suit pending in respect of cart track which leads from Minnapalayam road to the plaintiffs suit survey number property on the south of the suit property. P.W.2 in a way of improving the case of the plaintiffs would depose that he saw when the defendants cutting neem tree of the plaintiffs which was standing on the fence" mM**. But there was absolutely no pleadings in the plaint that a neem tree on the fence"BC" was cut by the defendants in the presence of P.W.2.

7d) The 5th defendant was examined as D.W.1 who would depose that without giving any notice to the defendants, the Commissioner has visited the property and filed Ex C1 report and Ex C2 plan. But in his evidence that after taking steps to set aside the Commissioner's report and plan, the defendants have filed the application and the same was dismissed by the trial Court. According to D.W1, the suit fence" " mM** as shown in Ex C2 is in survey No. 246 and not in survey No. 245. The plaintiffs have not filed any document before the trial Court to show that the disputed fence"BC" comes within the suit survey Number property and even before the trial Court they have not filed any survey plan to show that the disputed fence"BC" (as per rough sketch) comes within the suit survey number property. In the plaint, the plaintiffs would urge that there was an attempt made by the defendants on 20.6.1990 to cut the "BC" fence but this

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is not even spoken to by P.W.1 in his evidence. P.W.2 says that one of the defendants had cut the neem tree but there is no averment in the plaint to that effect that the defendants have cut and removed a neem tree in the said fence. Under such circumstances, as rightly held by the Courts below, the plaintiffs have failed to prove that there was an attempt made by the defendants to trespass into the plaint schedule property by medelling with "BC"fence and that there was no need to grant an order of injunction in favour of the plaintiffs.

8. The learned counsel appearing for the appellants relying on a decision reported in S.Palanisamy Gounder-vs-N.Palanisamy and three others (2007(1) CTC 611) and contended that on the basis of the Commissioner's report, a decision cannot be arrived at by the Court. In the said dictum, it has been observed by the learned Judge of this Court that the trial Court has considered the oral and documentary evidence and has rendered a decision and that the appointment of an Advocate Commissioner by the trial Court is only to guide the Court in arriving at a proper conclusion and that the trial Court has not entirely relied on the Advocate Commissioner's report to arrive at a decision and even in that dictum, there was no order of remand to the trial Court to re-consider the Commissioner's report and plan. So the contention of the learned counsel appearing for the appellants that the matter may be remitted to the trial Court for fixing the "BC" fence cannot hold any water. The facts in the abovesaid dictum will not be applicable to the present facts of the case. So I do not find any reason to interfere with the well considered findings of the learned first appellate Judge .The point is answered accordingly.

9. In the result, the appeal is dismissed , confirming the decree and Judgment in A.S.No.16 of 1996 on the file of the Court of Additional Subordinate Judge, Erode, with costs.

sg

Sd/
Asst. Registrar

/true copy/

Sub Asst.Registrar

To
1. The Additional Subordinate Judge,Erode.
2. The First Additional District Munsif, Erode.
3. The Section Offcier V.R. Section High Court, Madras,.
+ One cc to mr. A.K. Kumarasamy Advocate SR 10134
+ One cc to Mr. M.M. Sundresh Advocate sR 10081
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